ing circumstances. The investigation which a customs officer normally carries out at the customs check or by stopping the goods while in transit is a very limited investigation confined mainly to the questioning of the person in charge of the goods and, if that person were to be excluded, there can hardly be any evidence which the customs authorities may be able to produce relevant to the charge. The ordinary provisions of section 24 of the Evidence Ordinance must apply to such questioning and the information received as a result thereof.

The fact that the appellant made statements to P.W. 5 and P.W. 7 is only an additional piece of evidence against him. Even if these statements were excluded, there was the recovery of uncustomed goods not included in Exhibit P1A and Exhibit P1B, there was the reluctance of the appellant to answer at the 23rd mile Tebong, there was the fact that more undeclared goods were in fact found on top of the van when P.W. 7 asked P.W. 6 to examine them at Malacca than the mere one gross of playing cards which alone the appellant admitted to P.W. 5 and P.W. 7 and there was also the fact that the appellant's defence stood shattered and condemned with the result that whatever little onus the law cast on him remained undischarged.

I need not deal with the other grounds at length by repeating that a statement made to a customs officer is admissible in evidence when it is not shown that the customs officer made any inducement or used any force. When, however, the statement is retracted at the trial, corroboration should as a rule be necessary in order to satisfy the court that the statements can be acted upon. It is not necessary that every material fact in the confessional statement should be corroborated. The conduct of the accused which proved that he had a guilty mind may be relied upon as sufficient corroboration. I am also of the view that if in fact there is sufficient corroboration but the magistrate or the president fails to deal with that aspect of the matter in his grounds of judgment, that fact alone does not disentitle the appellate court to look for and find corroboration in the evidence produced in the trial court. (See *Pyare Lal* v. *State of Rajasthan*,[22] *Abdul Majid* v. *Public Prosecutor*[23] and *Lee Kim Yin* v. *Public Prosecutor*[24]). The learned president seems to have had no doubt about the truth of the confessionary statements made by the appellant to P.W. 5 and P.W. 7 and looking at the whole of the evidence I too have no doubt as to the truth of those statements (See *Lee Kim Yin* v. *Public Prosecutor*[24]).

Some criticism was levelled against the learned president in that he did not consider those parts of the statement of P.W. 2 which were favourable to the appellant. There is not much substance in that accusation if one reads the evidence of P.W. 2 as a whole and not in isolated pieces and especially when one bears in mind that the goods Exhibit P6, Exhibit P7 and Exhibit P8 were placed on top of the van covered with tarpaulin and P.W. 2 checked only one or two items from among the goods on top of the van.

Another ground which was urged at the hearing of the appeal was that the learned president in his grounds of judgment had not sufficiently given his reasons in order to qualify his judgment to be called a speaking judgment and that he should have dealt with all the points which have now been raised in this appeal. I do agree with the learned counsel for the appellant that the conclusions at which the court arrives ought normally to be supported by reasons duly recorded and that this requirement transcends all technical rules of procedure. I, however, am not prepared to agree that on that ground alone the judgment of the trial court could be set aside. In giving his grounds of judgment the learned magistrate (or the learned president) should briefly state the matters both of fact and law which he considered, the care which he exercised in considering those matters, and the extent and nature of doubt, if any, created in his mind. He should discuss the evidence and the probabilities arising from the circumstances of the case. The reasons for his findings should be stated. The grounds should indicate that he had in fact applied his mind to the evidence produced in the case. (See *Balasingham* v. *Public Prosecutor*[25]). I do not blame the learned president. There are always practical difficulties. He could and should have done better but how much! How much more, it may still be complained, I should also have covered and dealt with in this judgment!

The appeal is dismissed.

Appeal dismissed.

Solicitors: *Joseph & Son.*

COMPTROLLER-GENERAL OF INLAND REVENUE, MALAYSIA v. T

[F.C. (Azmi L.P., Suffian & Gill F.JJ.) March 2, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. X. 98 of 1969]

Income Tax — Gains or profits from employment — Redundancy pay — Compensation for loss of office — Retiring gratuity — Income Tax Ordinance, 1947, s. 10(b).

The respondent was employed as Chief Staff Surveyor with the Malaya-Borneo Building Society. He was told by a letter dated February 3, 1960 that if at any future time it be necessary to declare expatriate staff redundant, staff surveyors would be granted compensation for loss of office on terms not less generous than those that apply to redundancy. On November 25, 1965 the respondent was informed that he would be declared redundant and paid redundancy pay of $28,050. The Comptroller-General declared this sum to be chargeable for income tax "as gains or profits from employment" and his view was upheld by the Special Commissioners of Income Tax. On further appeal by way of case stated to the High Court, Chang Min Tat J. reversed the decision of the Special Commissioners. The Comptroller-General appealed to the Federal Court.

Held, dismissing the appeal: (1) on the facts it was not part of the service agreement that the society could terminate services of the respondent by paying him an agreed amount and therefore the sum paid was not paid under the contract of service;

(2) the respondent's employment was an employment which was likely to continue so long as he carried out his duties faithfully and until the society decided to ask him

to go by offering him reasonable compensation for his loss of career; the payment to the respondent was in respect of compensation for loss of office following on the abrogation of his service contract and therefore in the nature of a capital payment and not in the nature of income, so that it was not assessable for income tax;

(3) alternatively the payment was in the nature of a retiring gratuity within the meaning of section 13(1)(i) of the Income Tax Ordinance and therefore exempt from income tax.

Cases referred to:-

(1) *Henriksen* v. *Grafton Hotel Ltd.* [1942] 2 K.B. 184, 189.

(2) *Commissioners of Inland Revenue* v. *Wesleyan and General Assurance Society* 30 T.C. 11, 25.

(3) *Rellim* v. *Vise* 32 T.C. 254.

(4) *Shadford* v. *Fairweather* 43 T.C. 291.

(5) *Edwards* v. *Bairstow* [1956] A.C. 14.

(6) *Frazer* v. *Trebilock* 42 T.C. 217.

(7) *Bowden* v. *Russell & Russell* 42 T.C. 301.

(8) *J.P. Harrison* v. *Griffiths* 40 T.C. 281.

(9) *Chibbett* v. *Joseph Robinson & Sons* 9 T.C. 61.

(10) *Henry* v. *Arthur Foster; Henry* v. *Joseph Foster & Hunter* v. *Dewhurst* 16 T.C. 605.

(11) *Calvert* v. *Wainwright* 27 T.C. 475.

(12) *Reed* v. *Seymour* 11 T.C. 625.

(13) *Beynon* v. *Thorpe* 14 T.C. 1.

(14) *Duff* v. *Barlow* 23 T.C. 633.

(15) *Henley* v. *Murray* 31 T.C. 351.

(16) *Marriott* v. *Oxford & District Co-operative Society Ltd.* [1969] 1 All E.R. 47.

(17) *Duke of Westminster* v. *Commissioners of Inland Revenue* 19 T.C. 490, 520.

(18) *Coltness Iron Company* v. *Black* (1880-81) 6 App. Cas. 315, 330.

(19) *Russell* v. *Scott* [1948] 2 All E.R. 1, 5.

(20) *Greenwood* v. *F.L. Smidth & Co.* [1922] 1 A.C. 423.

(21) *Ormond Investment Company Ltd.* v. *Betts* [1928] A.C. 143, 156.

(22) *Kirkness* v. *John Hudson & Co. Ltd.* [1955] 2 All E.R. 345.

FEDERAL COURT.

Nik Saghir bin Mohamed Noor (Senior Federal Counsel) for the appellant.

S. Woodhull for the respondent.

Cur. Adv. Vult.

Gill F.J.: The question for determination in this appeal is whether the sum of $28,050 paid to the respondent as redundancy pay on the termination of his services as the Chief Staff Surveyor with the Malaya-Borneo Building Society is chargeable to income tax under section 10(1)(b) of the Income Tax Ordinance, 1947 as "gains or profits from any employment" within the meaning of section 10(2)(a) of the said Ordinance.

The question was answered in the affirmative by the Comptroller-General of Inland Revenue and he was upheld on appeal to the Special Commissioners of Income Tax. On a further appeal by way of case stated to the High Court, however, Chang Min Tat J. reversed the decision of the Special Commissioners. Hence the appeal to this court with the Comptroller-General as appellant.

The primary facts of the case are not in dispute. The respondent was employed as a staff surveyor by the Federal & Colonial Building Society Limited under a written agreement between the parties dated 23rd August, 1954. Clause 8 of the agreement provided for the payment by the society of the cost of the passages and travelling expenses of the respondent and his wife and children from the United Kingdom to Malaya, and of their return passages and travelling expenses back to the United Kingdom on the termination of the respondent's employment by death or otherwise, unless the agreement was terminated within a period of 33 calendar months from the date of its commencement. Clause 11 of the agreement provided for the determination of the agreement by either party giving to the other not less than three calendar month's notice in writing to expire it at any time.

In 1956 the name of the society was changed to the Malaya Borneo Society Limited, and the respondent continued to be employed by the society as a staff surveyor. On 3rd February, 1960 the society at a management meeting reviewed the conditions of service of its technical staff. On 6th February, 1960 the deputy general manager of the society wrote to the company's staff surveyors including the respondent a letter which, after referring to the management meeting held on 3rd February, 1960 stated as follows on the subjects of redundancy pay and loss of office:

"Redundancy Pay

The subject of redundancy was discussed and it was agreed that should a staff surveyor become redundant, management would consider the payment of redundancy pay to the surveyor concerned, the maximum benefit payable being limited to one month's pay (based on salary at date of redundancy) for every completed year's service subject to:—

(a) minimum compensation of 3 months' pay

(b) maximum compensation of 12 months' pay

Loss of office

The Society is a commercial company and as such need not have a Malaysian policy. Should it eventually become the policy of the Society's board that expatriate staff should be replaced by suitably qualified local staff, management would at that time draw up for the board's consideration a scheme for compensation for loss of office. Management cannot, however, anticipate what the scheme will be neither can it anticipate board's approval. However, it can safely be assumed that should compulsory replacement be introduced, staff surveyors would be granted compensation for loss of office on terms not less generous than those that apply to redundancy."

In 1965 the respondent was made the chief staff surveyor of the society. On 2nd November, 1965 the board of directors of the society passed a resolution —

(a) that the Society's Chief Staff Surveyor, Mr. T be declared redundant as from 1st December, 1965, and

(b) that Mr. T be given redundancy pay at the rate of one month's basic salary for every completed year's service subject to a maximum of 12 months' pay.

In pursuance of that resolution the respondent ceased to work with the society on 30th November, 1965 and left Malaya for London on the same day. His salary up to that day was paid, and he was paid a sum of $8,120 in lieu of 87 days' leave which was then due to him. He was further paid a sum of $28,050 as redundancy pay, which was worked out by multiplying his then salary by eleven, being the number of completed years of his service with the society. The society also paid for the passages of the respondent and his wife and children back to the United Kingdom.

As regards the nature of the payment in question in this appeal, the secretary of the society in answer to a letter dated 6th April, 1966 from the appellant's office stated in his letter dated 16th April, 1966 as follows: —

"There was no mention in Mr. T's service agreement dated 23rd August, 1954 regarding redundancy pay. Moreover, according to the normal practice of last in first out, Mr. T. should not have been the one to go as he was the most senior Staff Surveyor in the society by virtue of his length of service. This procedure was, however, not followed by the Society in Mr. T's case as it was the Society's policy to Malayanise its senior appointments wherever possible. There being sufficient local surveyors to take over the duties of expatriate officers, Mr. T was declared redundant at the end of 1965.

The amount of $28,050 was paid to Mr. T as consideration for the release of the Society's obligations and the scale of compensation based on one month's salary for every completed year of service merely follows the practice of other commercial concerns. This scale was adopted because it was considered to be a fair and easy way to quantify the amount of compensation. The payment was also in no way related to compensation for past services rendered."

He also gave evidence before the commissioners. When asked what the society's obligations were, he said that the society did not look into its legal obligations but merely felt obliged to adopt past practice. He further said that he did not know what discussions, if any, the respondent had with the manager of the society on the subject of his leaving the society, because he was not then employed by the society.

The conclusions at which the commissioners arrived with regard to the secretary's letter and his evidence before them was that it was unsafe for them to accept the statement in the last paragraph of the letter as this was something of which he had no personal knowledge, that the statement in the letter that the payment was in no way related to compensation for the past services rendered was merely his own opinion, and that there was doubt as to the accuracy of his statements in the letter in that he attributed redundancy pay to Malayanisation when they were mentioned separately under different headings in the letter of 6th February, 1960.

In my opinion, the Special Commissioners were wrong in totally rejecting the secretary's letter and his testimony before them. The secretary had not sent the letter of his own volition. It was sent in answer to a letter from the appellant's office. The secretary quite clearly had no improper motive in writing or saying anything to the benefit or detriment of Mr. T. The fact that he was not an employee of the society when the letter of 6th February, 1960 was written did not mean that he had no access to all the information relating to Mr. T's departure. That the society had no Malayanisation policy as such was clear from the letter. The letter clearly stated that the society had in mind the question of replacing expatriate staff by suitably qualified local staff and that in the event of their pursuing that policy they would consider the scheme for compensation for loss of office.

It is clear that the normal practice of "last in first out" was not followed in the case of Mr. T. because he was the most senior staff surveyor in the society by virtue of his length of service. The secretary's statement in the letter that that procedure was not followed by the society in Mr. T's case because it was the society's policy to Malayanise its senior appointments was not seriously challenged. It would appear clear therefore that redundancy pay was in fact tied up with loss of office by virtue of Mr. T.'s appointment being Malayanised. Again, the secretary's statement that, there being sufficient local surveyors to take over the duties of expatriate officers, Mr. T. was declared redundant at the end of November, 1965 was also not challenged. Bearing in mind the ordinary dictionary meaning of the word "redundant" to be 'superabundant, superfluous or excessive', and the fact that Mr. T became redundant not because his post was abolished but because there were suitably qualified local officers to take his place, this was not a case of redundancy in the true sense of the word. It therefore follows that his so-called redundancy pay was in fact Malayanisation money or compensation for loss of office.

The sum paid to the respondent has been variously described as a payment on account of redundancy, a payment as compensation for loss of office, or a payment in accordance with his contract of employment. But the name or description given by the parties to the payment made is not necessarily decisive of the nature of the payment. Lord Greene M.R. in *Henriksen* v. *Grafton Hotel, Ltd.*[1] said:

"For this purpose the first thing to do is to examine the nature of the payment, that is to say, the nature of the subject in respect of which the payment is made. In this connection the manner of payment may be relevant as throwing light upon its nature. In many cases — and in my opinion this is one of them — the question will be found to answer itself once the true nature of the payment is ascertained."

As stated by Viscount Simon in *Commissioners of Inland Revenue* v. *Wesleyan and General Assurance Society,*[2] "the question always is what is the real character of the payment, not what the parties call it." The test in a case such as this will finally be seen in the quality of the payment in the hands of the recipient (see *Halsbury,* 3rd edition, Volume 20, page 30).

The principal ground of appeal before this court is that the learned judge wrongly rejected the following inferences drawn or the conclusions reached by the Special Commissioners: —

"(a) that the Society and the respondent had agreed to modify the service agreement dated the 23rd August, 1954, to the effect that if the respondent's post was declared redundant, his employment with the Society could be terminated without the Society giving him three months' prior notice provided that the respondent was paid what was termed as redundancy pay;

(b) that the payment to the respondent of the said sum of $28.050 was not in fact compensation for loss of a source of income or of a right to remuneration as a result of abrogation of the service agreement; and

(c) that the respondent had no absolute right to continued employment under the service agreement."

It is contended for the appellant, on the authority of *Rellim* v. *Vise*[3] and *Shadford* v. *Fairweather*[4] that the cardinal principle to be followed by an appeal court is that it should not interfere with the findings of fact of the Special Commissioners. The question then is, what are the circumstances under which an appeal

court is justified in disturbing the findings of the Special Commissioners? This question was answered by the House of Lords in *Edwards* v. *Bairstow*.[5] Viscount Simonds said at page 29:

"For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarized by saying that the court should take that course if it appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained."

Lord Radcliffe in the same case stated the principle in much more elaborate terms when he said at pages 35 and 36:

"I think that the true position of the court in all these cases can be shortly stated. If a party to a hearing before commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything *ex facie* which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur."

Thus, the determination of the Special Commissioners was quashed by the courts in *Frazer* v. *Trebilcock*[6] where there was no evidence to support the determination, in *Bowden* v. *Russell & Russell*[7] where the evidence was inconsistent with the determination and in *J.P. Harrison* v. *Griffiths*[8] where the only reasonable conclusion contradicted the determination. *Halsbury*, 3rd edition, Volume 20 at page 697 states the principle succinctly as follows: —

"The question whether or not there was any evidence for the commissioners to support their determination of a fact is a question of law, and, where the only true and reasonable conclusion from the evidence contradicts the determination of the commissioners, the court must intervene to review their decision. Moreover where it appears to an appellate court that no person, if properly instructed in the law and acting judicially, could have reached the determination in question, the court may proceed on the assumption that a misconception of law has been responsible for the determination, although the case stated shows on the face of it no misconception of law."

As I have stated, there is no dispute about the primary facts. The inference which the Special Commissioners drew from those facts was that by the society stating in its letter of 6th February to the respondent that should a staff surveyor become redundant the management would consider the payment of redundancy pay, and by the respondent making no protest or raising any objection to the proposed redundancy pay scheme, thereby tacitly accepting the scheme, there was introduced a supplementary provision to the service agreement. In other words, the inference drawn by them was that clause 11 of the service agreement between the parties was modified to the extent that the society could terminate the services of the respondent by paying him the amount arrived at by multiplying his then salary by a number representing the number of years of his completed service and that such payment would then be under his contract of service and therefore liable to income tax.

The question, however, is whether there was ever a concluded agreement between the parties for modifying or varying the initial agreement in the sense that there was a definite offer made to the respondent and an unqualified acceptance of that offer by him. The learned judge in the court below said that he could find or detect no such agreement either express or implied on the part of the appellant. With respect, I entirely agree. It is clear that there was in fact no concrete proposal in the nature of an offer by the society for the variation or modification of the service agreement. A statement by one party to another that in the event of a situation arising in the future he might consider making an offer of some sort does not amount to an offer which is meant to be accepted by such other party so as to conclude a legally binding agreement between them. Similarly, silence on the part of the party to whom such a proposal is made does not amount to an acceptance of the proposal. In my judgment the letter of 6th February, 1960 by the society was nothing more than an intimation of its intention as to what it might consider doing with a view to terminating the services of its staff surveyors, and it called for no answer on the part of any of the staff surveyors to whom it was sent. At best, it was an advance information of what the society had in mind.

The agreement under which the respondent's services with the society were terminated was the agreement which came into being by the society conveying the terms of the resolution by its board of directors on 2nd November, 1965 and the respondent accepting the terms of the resolution by leaving the service on 30th November, 1965 as required. The travelling expenses of the respondent and of his wife and children back to the United Kingdom were paid impliedly under this new agreement. In any event, the respondent was entitled to free passages for himself and his family if his services were terminated by "death or otherwise" after 33 months from the commencement of the agreement. I can therefore find no merit in the appellant's argument that because the society paid for the passages back to the United Kingdom of the respondent and his family, for which there was provision in the original agreement, the so-called redundancy pay was also paid under the same agreement.

As regards the duration of the respondent's employment, it is clear, as stated by the Special Commissioners, that he had no absolute right to be em-

ployed up to a certain date, because under the terms of his contract of service his employment was liable to be terminated at any time by his employers giving the requisite notice. In other words, it was open to the society, when they decided that the respondent should go, to get rid of him by giving him three months' notice under the agreement. But they chose not to do so. Obviously they had no such intention, because no reputable society would mete out such shabby treatment to a longstanding and faithful servant. Their policy was to replace expatriate officers by local officers, but they also had in mind their moral, if not legal, obligation to provide suitable compensation in pursuing that policy. It would therefore be correct to say that the respondent's employment was an employment which was likely to continue so long as he carried out his duties faithfully and until the society decided to ask him to go by offering him reasonable compensation for loss of his career.

Rowlatt J. in *Chibbett* v. *Joseph Robinson & Sons*[9] said: "... compensation for loss of an employment which need not continue, but which was likely to continue, is not an annual profit within the scope of the income tax at all." He adhered to the same general principle in *Henry* v. *Arthur Foster, Henry* v. *Joseph Foster* and *Hunter* v. *Dewhurst*,[10] but his judgment in those three cases was reversed by the Court of Appeal. *Hunter* v. *Dewhurst*,[10] however, went up to the House of Lords where the ultimate result was the same as that arrived by Rowlatt J., although for entirely different reasons and on an entirely different principle. It would seem clear that the House of Lords decided the case on its special circumstances, but there is nothing in the judgments of the Court of Appeal or of the House of Lords to suggest that the *dictum* of Rowlatt J. in *Chibbett* v. *Joseph Robinson & Sons*[9] was expressly disapproved of. I do not therefore agree with the commissioners that it is not safe to place reliance on that *dictum*. It is true that *Chibbett* v. *Joseph Robinson & Sons*[9] was a case of voluntary payment, but that does not make the *dictum* as a rule of general application irrelevant to a contractual payment. The conclusion at which I have arrived is that, since the respondent's employment was one which was likely to continue, the sum of $28,050, if it was in fact compensation for loss of his employment and in no way related to compensation for the services rendered in the past, is not liable to income tax.

I agree with the Special Commissioners that the payment of $28,050 was made to the respondent, not because he was T but because he was a staff surveyor of the society, it being clear that the intention of the society was to give redundancy pay to all expatriate staff surveyors who were asked to go. Clearly, therefore, this was not a case of a personal gift given on personal grounds other than for services rendered, as explained by Atkinson J. in *Calvert* v. *Wainwright*.[11] A personal gift as such is of course not liable to income tax (see *Reed* v. *Seymour*[12] and *Beynon* v. *Thorpe*[13]), but a voluntary payment made to the recipient by virtue of his office or employment would be a gratuity within the meaning of section 10(2)(a) and therefore liable to income tax under section 10(1)(b) of the Income Tax Ordinance, 1947. It was upon this ground that the Special Commissioners held the amount paid to the respondent to be assessable to income tax on the basis that it was a payment made by virtue of the respondent's employment.

In my judgment they were clearly wrong in reaching that finding, because this was not an obligatory payment under the agreement of 23rd August, 1954 which was the only contract of employment between the parties. As I have already stated, there never was any agreement between the parties to vary the terms of that original agreement as regards the clause relating to the termination of the respondent's employment. The determining factor in the present case is that the payment to the respondent, whatever the parties may have chosen to call it, was not a payment which the society had contracted to make to the respondent as part of his remuneration for his services as a staff surveyor. It was therefore in no way related to compensation for the past services rendered by the respondent. But for the subsequent agreement, to which I have referred earlier in my judgment, the society was under no legal obligation to make a payment in respect of the so-called redundancy pay. Clearly, therefore, the amount of $28,050 was paid to the respondent for the release of the society's obligations under the contract of employment. In other words, it was a payment of compensation for the total abrogation of the service contract as from 1st December, 1965 following a prior agreement or understanding.

The agreement reached here prior to the abrogation of the contract related only to the quantum payable for such an abrogation. In this connection, Lord Atkin in the House of Lords in *Hunter* v. *Dewhurst*[10] said at page 645:

> "It seems to me that a sum of money paid to obtain a release from a contingent liability under a contract of employment cannot be said to be received 'under' the contract of employment, is not remuneration for services rendered or to be rendered under the contract of employment, and is not received 'from' the contract of employment."

The legal position is summed up by *Halsbury*, 3rd edition, Volume 20, paragraph 593 at page 324 as follows: —

> "Compensation for the loss of an office or employment, if it be truly such, there being no reserved right to it under the contract of service and no outstanding remuneration due for services performed, is not a profit of the office or employment assessable to tax. If, on a true appreciation of the legal effect of the transaction, the compensation is payable because the contract of employment has been abrogated, then, whether that compensation is due by fresh agreement or as a result of proceedings, it is not chargeable to tax as an emolument of the employment. Neither is a sum received by the employee in consideration of his releasing the employer from a contingent liability under the contract of service so chargeable."

In *Duff* v. *Barlow*[14] and *Henley* v. *Murray*[15] the amounts paid to the employees on the abrogation of their contracts of employment were held not to be liable to income tax. In the first case Barlow had the right under his service agreement to continued employment up to 31st December, 1945 but he ceased to work as from 25th November, 1937 by a subsequent agreement. Similarly, in the second case Henley's employers were obliged under the service agreement to employ

him until 31st March, 1944 but his appointment was terminated on 6th July, 1943. The Special Commissioners sought to distinguish the present case from those two cases on the ground that in the present case the respondent had no absolute right to be employed up to a certain date and that his employment was terminated from a date on which his employers had the right to terminate it under the service agreement. The question, however, is, did the society in this case terminate the respondent's employment under the service agreement? The answer clearly is that they did not, even though they could have, as I have pointed out earlier. It is true that the respondent's contract was not up to any definite date, but it was a contract which was likely to continue until terminated. Eventually when his employment was terminated it was not terminated under the terms of his contract of employment, there being no consensual variation of the contract as in *Marriott* v. *Oxford and District Co-operative Society, Ltd.*,[16] but under a fresh agreement which was reached by the communication to the respondent of the resolution by the board of directors and of his acceptance by leaving the service as required by that resolution. There can therefore be no doubt that the sum of $28,050 having been paid to the respondent in consideration of the abrogation of his contract of employment, it is not liable to income tax.

In considering the substance of the transaction there is a danger of so construing the matter as to cause it to be brought under tax liability. This doctrine of "the substance of the matter" urged in earlier tax cases was finally rejected by the House of Lords in *Duke of Westminster* v. *Commissioners of Inland Revenue*[17] in which Lord Tomlin said:

"Apart, however, from the question of contract with which I have dealt it is said that in Revenue cases there is a doctrine that the court may ignore the legal position and regard what is called 'the substance of the matter' and that here the substance of the matter is that the annuitant was serving the Duke for something equal to his former salary or wages and that, therefore, while he is so serving, the annuity must be treated as salary or wages. This supposed doctrine (upon which the Commissioners apparently acted) seems to rest for its support upon a misunderstanding of language used in some earlier cases. The sooner this misunderstanding is dispelled and the supposed doctrine given its quietus the better it will be for all concerned, for the doctrine seems to involve substituting 'the uncertain and crooked cord of discretion' for 'the golden and straight mete wand of the law'.

Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow tax-payers may be of his ingenuity, he cannot be compelled to pay an increased tax. This so-called doctrine of 'the substance' seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable."

It is common ground that the respondent is sought to be taxed under section 10(1)(b) of the Income Tax Ordinance, 1947. The tax is in respect of gains or profits from any employment. Section 10(2)(a) defines "gains or profits from any employment" to mean

"any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite or allowance (other than a subsistence, travelling, conveyance or entertainment allowance which is proved to the satisfaction of the Comptroller to have been expended for purposes other than those in respect of which no deduction is allowed under section 15 of this Ordinance) paid or granted in respect of the employment whether in money or otherwise;"

Thus, payment by way of compensation for loss of office is not specifically charged as income, nor is it a designated source of income. The corollary therefore is that a profit not itself specifically charged as income and not derived from a designated source is not taxable as income.

The words of section 10 in themselves do not unambiguously impose a tax for payments made as compensation for loss of office. In the absence of a clear intention that tax should be imposed, the respondent is not liable to payment for the sum granted for the abrogation of his contract. It is an important canon in the construction of revenue Acts that the subject is not to be taxed unless there are clear words in the Act imposing such a tax. In this connection, Lord Blackburn said in the House of Lords in *Coltness Iron Company* v. *Black*[18]:

"No tax can be imposed on the subject without words in an Act of Parliament clearly shewing an intention to lay a burden on him. .... and I think the only safe rule is to look at the words of the enactment and see what is the intention expressed by those words."

Lord Simonds in *Russell* v. *Scott*[19] reasserted the same rule of construction when he addressed the House of Lords in the following words: —

"My Lords, there is a maxim of income tax law which, though it may sometimes be over-stressed, yet ought not to be forgotten. It is that the subject is not to be taxed unless the taxing statute unambiguously impose the tax on him. It is necesary that this maxim should on occasion be reasserted and this is such an occasion."

It is to be observed that section 13(1)(e) of the Income Tax Act, 1967 provides as follows: —

"Gross income of an employee in respect of gains or profits from an employment includes any amount received by the employee, whether before or after his employment ceases, by way of compensation for loss of the employment...."

This new Act satisfies the rule to which reference was made by Lord Buckmaster in *Greenwood* v. *F. L. Smidth & Co.*[20] in the following words: —

"It is, I think, important to remember the rule, which the courts ought to obey, that, where it is desired to impose a new burden by way of taxation, it is essential that this intention should be stated in plain terms. The courts cannot assent to the view that if a section in a taxing statute is of doubtful and ambiguous meaning, it is possible out of that ambiguity to extract a new and added obligation not formerly cast upon the taxpayer."

The later Act of 1967 imposes a new liability, extends the burden and clearly alters the intention of the earlier Ordinance of 1947. In view of this, it is proper to interpret the earlier Ordinance by reference to the later Act if, in the words of Lord Buckmaster in *Ormond Investment Company Ltd.* v. *Betts*,[21] the provision in the earlier Act is "fairly and equally open to divers meanings".

In *Kirkness* v. *John Hudson & Co., Ltd.*[22] it was held that a later statute may not be referred to for the purpose of interpreting clear terms of an earlier Act which the later statute does not amend, even though both Acts are by the express provision of the later

statute to be construed as one, unless the later statute expressly places a particular interpretation on the terms of the earlier Act; but if the earlier enactment was ambiguous, a later statute may throw light on the true interpretation of that enactment, as where a particular construction of the earlier enactment will render the later incorporated statute effectual. *Maxwell* on Interpretation of Statutes, 11th edition, at page 22 says:

"There is some presumption that Statutes passed to amend the law are directed against defects which have come into notice about the time when those Statutes passed."

In my judgment there can be little doubt that there was a defect in the Ordinance of 1947 which has been cured by the new Act by including in the definition of "gains or profits from an employment" the words "compensation for loss of employment" which are not to be found in the earlier Ordinance. Clearly, therefore, the compensation paid to the respondent on the abrogation of his contract of service is not liable to tax under the Ordinance of 1947. Indeed, it was acknowledged by counsel for the appellant in the court below that if the sum paid to the respondent is held to be compensation for loss of office, then it is not liable to income tax under that Ordinance.

That brings me to the only other point to be considered, namely, whether the amount paid to the respondent was a retiring gratuity within the meaning of section 13(1)(i) of the Income Tax Ordinance, 1947. The Special Commissioners held that it was not a retiring gratuity because the respondent never applied to retire and his employment was terminated at the instance of his employers. Before us it was contended for the appellant that since the respondent got a job in Trinidad soon after he stopped working for the society he cannot be said to have retired, the argument being that no man can be said to have retired unless he stops working altogether. I do not think either of these reasons is a valid reason for holding that what was paid to the respondent was not a retiring gratuity. A retirement from employment is none the less a retirement whether it takes place at the instance of the employer or of the employee, and it does not cease to be a retirement merely because the man subsequently finds a job with another employer. Counsel for the appellant laid emphasis on the fact that in section 13(1)(i) of the Ordinance the word "retiring" is followed immediately by the words "or death". But that is neither here nor there. While there may be finality in death, it does not necessarily follow that there is finality about retirement, because a person may retire from one employment and yet take up another. As far as the respondent was concerned, he had retired from his service with the society and the money was paid to him on such retirement. It was therefore a retiring gratuity which is exempt from income tax.

In the result, for the reasons I have stated the payment of $28,050 to the respondent was in respect of compensation for loss of office following on the abrogation of his service contract and therefore in the nature of capital payment and not in the nature of an income, so that it is not assessable to income tax. Alternatively, it was a payment in the nature of a retiring gratuity within the meaning of section 13(1)(i) of the Income Tax Ordinance, 1947 and therefore exempt from income tax.

I would dismiss the appeal with costs.

Azmi L.P. and **Suffian F.J.** concurred.

Appeal dismissed.

Solicitors: *Shearn, Delamore & Co.*

MANGGAI v. GOVERNMENT OF SARAWAK & ANOR.

[F.C. (Ismail Khan C.J. (Borneo), Ong C.J. (Malaya) & Gill F.J.) March 9, 1970]

[Kuching — Federal Court Civil Appeal No. X. 30 of 1969]

Practice and Procedure — Declaration — Application for declaration that the Resident's Native Court was functus officio and that a judgment delivered by it was null and void — Possibility of appeal to Native Court of Appeal — Adequate alternative remedy — Declaration refused.

The applicant had applied for a declaration, *inter alia*, that the Resident's native court was *functus officio* and without jurisdiction to hear the case by way of appeal or otherwise and that the purported judgment delivered by that court was null and void. The applicant did not pursue his right of appeal to the Native Court of Appeal. The High Court refused the application for a declaration and the applicant appealed to the Federal Court.

Held, dismissing the appeal: as the applicant had not pursued the alternative remedy available to him of an appeal to the Native Court of Appeal, the High Court was right in refusing to make the declaration.

Cases referred to:-

(1) *Anisminic Ltd.* v. *The Foreign Compensation Commission* [1969] 1 All E.R. 208.

(2) *Dyson* v. *Attorney-General* [1911] 1 K.B. 410.

(3) *Barraclough* v. *Brown* [1897] A.C. 615, 620.

(4) *Pasmore* v. *The Oswaldtwistle Urban District Council* [1898] A.C. 387, 394.

(5) *Wilkinson* v. *Barking Corporation* [1948] 1 K.B. 721, 724.

FEDERAL COURT.

T. O. Thomas for the appellant.

Mohamed Jemuri bin Serjan (Assistant Attorney-General) for the respondents.

Cur. Adv. Vult.

Ismail Khan C.J. (Borneo): I have read the judgment of my brother Gill with which I am in entire agreement. I would dismiss the appeal with costs.

Ong C.J. (Malaya): I agree with the judgment of my brother Gill and for the reasons stated by him I would dismiss the appeal with costs.

Gill F.J.: The appellant in this case, being plaintiff in the action in the High Court at Kuching from which this appeal has arisen, had a dispute with ex-penghulu Tawi anak Selaku, the first defendant to the action in the court below, over some land situate in the district